IN THE

Supreme Court of the United States

October Term, 1978
No. 78-1369

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BARBARA BROOKS, NAOMI COWEN, ROBERT B. ESSEX, FLORENCE FLAST, CHARLOTTE GREEN, HELEN HENKIN, MARTHA LATIES, BLANCHE LEWIS, ELLEN MEYER, REV. ARTHUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, HOWARD M. SQUADRON, CHARLES H. SUMNER and CYNTHIA SWANSON,

Appellants,

—against—

EDWARD V. REGAN, as Comptroller of the State of New York, and GORDON AMBACH, as Commissioner of Education of the State of New York,

Appellees,

—and—

HORACE MANN-BARNARD SCHOOL, LASALLE ACADAMY, LONG ISLAND LUTHERAN HIGH SCHOOL, ST. MICHAEL SCHOOL and YESHIVAH RAMBAM,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES HORACE MANN-BARNARD SCHOOL, LASALLE ACADEMY, LONG ISLAND LUTHERAN HIGH SCHOOL AND ST. MICHAEL SCHOOL

RICHARD E. NOLAN
Attorney for Appellees Horace Mann-Barnard School, LaSalle Academy, Long Island Lutheran High School and St. Michael School
1 Chase Manhattan Plaza
New York, New York 10005
Tel.: (212) 422-3400

THOMAS J. AQUILINO, JR.
THOMAS A. SCHWEITZER
Of Counsel

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Opinions Below

The majority and dissenting opinions of the three-judge District Court, upon which the Judgment appealed from is based, are set forth in the Appendix to this Brief and are reported at 461 F.Supp. 1123 *et seq.*

Constitutional Provision and Statute Involved

The First Amendment provides, in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .

The statute involved is Chapter 507, as amended by Chapter 508, of the 1974 Laws of New York,[1] entitled "An Act to provide for the apportionment of state monies to certain nonpublic schools, to reimburse them for their expenses in complying with certain state requirements for the administration of state testing and evaluation programs and for participation in state programs for the reporting of basic educational data".

[1] Hereinafter referred to as Chapter 507.

Question Presented

Whether reimbursement of religiously-affiliated nonpublic schools for actual costs incurred by them in preparing state attendance and related reports and in administering standardized state-prepared examinations in secular subjects, which reporting and testing is done to ensure compliance with the New York Education Law and to ensure that pupils receive adequate instruction in secular subjects, is in conformity with the Establishment Clause.

Statement of the Case

The factual background of Chapter 507 requires a brief review of the earlier Mandated Services Act,[2] held unconstitutional in *Levitt v. Comm. for Pub. Educ. & Religious Liberty,* 413 U.S. 472 (1973). That Act provided for state reimbursement of nonpublic schools on a per-pupil allotment basis, rather than actual cost, for

> expenses of services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation.[3]

[2] [1970] Laws of N.Y. ch. 138.

[3] *Id.,* § 2.

A three-judge District Court decided that "Chapter 138 violates the establishment clause of the First Amendment." *Comm. for Pub. Educ. & Religious Liberty v. Levitt,* 342 F. Supp. 439, 445 (S.D.N.Y. 1972). This decision was based upon the rationale that:

> . . . By far the greatest portion of the funds appropriated under Chapter 138 is paid for the services of teachers in testing students, and testing is an integral part of the teaching process. As the Court commented in *Lemon,* "teachers have a substantially different ideological character from books." It is this fundamental distinction which makes the limited rules of *Everson* [*v. Board of Education,* 330 U.S. 1 (1947)] and [*Board of Education v.*] *Allen* [392 U.S. 236 (1968)] inapplicable. (342 F. Supp. at 444)

This Court affirmed, noting that two kinds of tests and examinations were covered by the Mandated Services Act, both "state-prepared" and "traditional teacher-prepared", and pointing out that the "overwhelming majority" were of the latter variety. *Levitt v. Comm. for Pub. Educ. & Religious Liberty,* 413 U.S. at 475. This Court cited verbatim the crux of the District Court's opinion set forth above[4] and affirmed its reasoning as follows:

> . . . Chapter 138 provides for a direct money grant to sectarian schools for performance of various "services." Among those services is the maintenance of a regular program of traditional internal testing designed to measure pupil achievement. Yet, despite the obviously integral role of such testing in the total teaching process, no attempt is made under the statute, and no means are available, to assure that internally prepared tests are free of religious instruction.
>
> We cannot ignore the substantial risk that these examinations, prepared by teachers under the authority of religious institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church. We do not "assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment." *Lemon v. Kurtzman,* 403 U.S., at 618. But the potential for conflict "inheres in the situation," and because of that the State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination. See *id.,* at 617, 619. Since the State has failed to do so here, we are left with no choice under [*Comm. for Pub. Educ. & Religious Liberty v.*] *Nyquist* [413 U.S. 756 (1973)] but to hold that Chapter 138 constitutes an impermissible aid to religion; this is so because the aid that will be devoted to secular functions is not identifiable and separable from aid to sectarian activities.[5]

In conclusion, however, this Court was careful to indicate that actual costs incurred by schools in performing secular services may be reimbursable. It stated:

> We hold that the lump-sum payments under Chapter 138 violate the Establishment Clause. Since Chapter 138 provides only for a single per-pupil

[4] *See* 413 U.S. at 478.

[5] 413 U.S. at 479-80. *See also id.* at 481.

> allotment for a variety of specified services, some secular and some potentially religious, neither this Court nor the District Court can properly reduce that allotment to an amount corresponding to the actual costs incurred in performing reimbursable secular services. That is a legislative, not a judicial, function. (413 U.S. at 482)

Chapter 507

In April 1974, the New York Legislature, acting pursuant to a specific proposal of the Regents[6] and guided by this Court's decision in *Levitt,* passed by overwhelming majorities[7] in both houses Chapter 507, which became law on May 23, 1974.[8]

Unlike the Mandated Services Act, Chapter 507 does not provide for reimbursement for "traditional teacher-prepared" tests and examinations.[9] Rather, Section 3 provides:

> The Commissioner shall annually apportion to each qualifying school . . . an amount equal to the actual cost incurred by each school during the preceding school year for providing services required by law to

[6] *See* N.Y. State Educ. Dep't, *Major Recommendations of the Regents for Legislative Action—1974,* at 12 (Dec. 1973).

[7] In the Assembly, the vote was 134 to 10. *See* [1974] 1 J. N.Y. Assembly 1318. The vote in the Senate was 48 to 7. *See* [1974] J. N.Y. Senate 262.

[8] Chapter 508, adding Section 9, a severability provision, to Chapter 507, was enacted the same day.

[9] The elimination of the costs involved in administering these teacher-prepared examinations resulted in a drastically reduced appropriation—down from $28,000,000 a year to $8,000,000. *See* N.Y. State Educ. Dep't, *Major Recommendations of the Regents for Legislative Action—1975,* at 49 (Dec. 1974).

> be rendered to the state in compliance with the requirements of the state's pupil evaluation program, the basic educational data system, regents examinations, the statewide evaluation plan, the uniform procedure for pupil attendance reporting, and other similar state prepared examinations and reporting procedures.

In addition, Chapter 507 differs from the Mandated Services Act in that Chapter 507 provides for reimbursement for actual costs expended, as distinguished from the per-pupil formula used in the Mandated Services Act.[10]

Section 5 of Chapter 507 requires that "[e]ach school which seeks an apportionment pursuant to this act shall maintain a separate account or system of accounts for the expenses incurred in rendering the services required by the state to be performed." Section 7 provides that:

> No application for financial assistance under this act shall be approved except upon audit of vouchers or other documents by the commissioner as are necessary to insure that such payment is lawful and proper.
>
> The state department of audit and control shall from time to time examine any and all necessary accounts and records of a qualifying school to which an apportionment has been made pursuant to this act

[10] In its opinion in *Levitt,* this Court pointed out that the Mandated Services Act

> contains no provision authorizing state audits of school financial records to determine whether a school's actual costs in complying with the mandated services are less than the annual lump sum payment. Nor does the Act require a school to return to the State moneys received in excess of its actual expenses. (413 U.S. at 477) (footnote omitted)

> for the purpose of determining the cost to such school of rendering the services referred to in section three of this act. If after such audit it is determined that any qualifying school has received funds in excess of the actual cost of providing the services enumerated in section three of this act, such school shall immediately reimburse the state in such excess amount.

Proceedings Prior to This Court's Order of June 27, 1977

The plaintiffs filed their complaint on June 20, 1974 against the Comptroller and the Commissioner of Education of the State of New York, seeking a declaratory judgment that Chapter 507 is violative of the Establishment Clause[11] and a permanent injunction against any state payments to religiously-affiliated schools. Thereafter, the five nonpublic schools, which are appellees herein, were permitted to intervene as defendants. The verified answers of each of these schools to the plaintiffs' interrogatories 5(a) and 5(g) showed that they do not discriminate on the basis of religion in the admission of students and employment of faculty.[12]

[11] Count II of the Complaint alleged a claim under the Free Exercise Clause [*see* Appendix, p. 14a], but this was not pressed in the District Court and is not urged in appellants' Brief in this Court.

[12] None of the four religiously-affiliated appellee schools requires obedience by its pupils to the doctrines, laws and dogmas of a particular faith, and none is an integral part of the religious mission of the church or group sponsoring it. *See* Responses of Intervenor-Defendants LaSalle Academy, Long Island Lutheran High School, St. Michael School and Yeshivah Rambam to Plaintiffs' Interrogatories 5(c) and 5(e).

A three-judge District Court was convened and heard argument based upon the pleadings and the defendants' and the intervenor-defendants' answers to the plaintiffs' interrogatories. On June 21, 1976, the District Court decided that Chapter 507 was "unconstitutional to the extent that it authorizes the allocation of funds to sectarian schools." The Court's opinion stated, in part:

> Absent the decision in *Meek v. Pittenger,* [421 U.S. 349 (1975)], we might have found defendants' arguments persuasive. However, in light of the decision in *Meek,* we fail to see any alternative but to declare the statute unconstitutional because it has the primary effect of advancing religion.[13]

Judgment was entered on July 28, 1976, permanently enjoining enforcement of Chapter 507 as applied to "sectarian schools".

On June 27, 1977, after the state defendants and intervenor-defendants had appealed to this Court and while their jurisdictional statements were under consideration, this Court (three justices dissenting without opinion) entered an order vacating the District Court's injunction and remanding the case for reconsideration in light of the decision rendered that day in *Wolman v. Walter,* 433 U.S. 229 (1977). *Levitt v. Comm. for Pub. Educ. & Religious Liberty* (No. 76-595) and *LaSalle Academy v. Comm. for Pub. Educ. & Religious Liberty* (No. 76-713), 433 U.S. 902 (1977).

[13] *Comm. for Pub. Educ. & Religious Liberty v. Levitt,* 414 F. Supp. 1174, 1178 (S.D.N.Y. 1976).

Facts Stipulated Upon Remand to the District Court

Upon remand, the parties entered into a Stipulation of Facts[14] as to the nature of the activities reimbursable under Chapter 507 and the procedures followed by the nonpublic school personnel and by the State with respect thereto, and incorporating samples of the standardized state-mandated and prepared examinations, scoring guides, attendance-reporting forms and other materials involved under Chapter 507.

With respect to the activities of nonpublic school personnel incident to attendance records required to be maintained under Section 3211 of the New York Education Law, the Stipulation provides:

> . . . 23. Nonpublic schools are required to submit by July 15th of each year an Attendance Report, Form AT-6N, to the State Education Department. A sample Form AT-6N . . . is . . . Exhibit 34.
>
> 24. Nonpublic-school personnel, generally an attendance secretary (or secretaries), perform the following services in regard to the State's uniform procedure for attendance reporting: collecting of attendance reports from homeroom and classroom teachers; collation of teacher reports; recording of attendance on record forms prepared to meet State specifications; ongoing record-keeping related to data which is required for Form AT-6N and all other State Education Department and local-school-district reports; and processing and recording of new registrations and transfers.

[14] Copies of this Stipulation comprise pages 24a-43a of the Appendix as well as the Appendix to the Motion of Appellee Schools to Dismiss or Affirm dated April 6, 1979 and filed herein. The exhibits to this Stipulation have been filed with the Clerk of this Court.

In addition, the State Education Department requires annually a Basic Educational Data System Report of Nonpublic Schools (BEDS)[15] which, as the District Court observed, "contains information regarding the student body, faculty, support staff, physical facilities and curriculum of each school." 461 F. Supp. at 1126.

With respect to administration of the standardized state-prepared examinations, which are given to pupils in public and nonpublic schools alike, the Stipulation provides, in part:

> 14. A number of standardized tests are provided by the Education Department to help improve the educational program offered in the schools of the State of New York. All tests and accessories are offered at no charge.
>
> 15. The Education Department has established a statewide Pupil Evaluation Program (PEP), a full testing program required of all pupils in grades 3 and 6 in the public and nonpublic schools in New York State. Tests for pupils in Grade 9 are also available for schools that wish to use them on an optional basis. The tests used in the program are standardized reading and mathematics achievement tests developed and published by the Education Departments and based on New York State courses of study: . . .
>
> 16. Nonpublic-school personnel perform the following services in regard to PEP tests: ordering and receiving of test materials; arranging for space, time, proctors, distribution and collection of test materials;

[15] *See* Stipulation of Facts, paras. 17, 18, 28 and Exhibits 22 and 23.

proctoring of tests; arranging for scoring of the exams, either by machine or by hand; and collection, collation and reporting of results to the State Education Department.

. . . 19. Regents examinations are end-of-course comprehensive achievement tests based on State courses of study for use in grades 9-12. . . .

20. Nonpublic-school personnel perform the following services in regard to Regents examinations: ordering and receiving the examination materials; arranging and maintaining security of materials until specified date and time; arranging for space, time, proctors, distribution and collation of materials; proctoring of examinations; scoring of the examinations; collection and collation of examination materials and results; recording of grades on student records; arranging for return of examination materials to the State Education Department; and arranging for safe storage of all other examination papers.

Exhibit 33 to the Stipulation is a sample Deputy and Proctor Certificate which must be signed by each person "who assisted in the administration of Regents examinations", declaring that he or she "fully and faithfully observed the rules and regulations of those examinations".

Nonpublic schools seeking reimbursement must file prescribed forms with the State Education Department. These forms show precisely the method used to compute the schools' requests for reimbursement, together with apportionment forms showing the exact services rendered, time expended, and monetary charges. In addition, Section 176.2 of the Regulations of the Commissioner of Education requires that specific records be maintained by

the schools with respect to underlying support data so that state audits can be carried out pursuant to Chapter 507 quickly and with a minimum of direct involvement of state employees with the schools or their personnel.

Under Chapter 507, the four religiously-affiliated appellee schools have been reimbursed for the 1974-75 year as follows:

Expenditure Item	*LaSalle*	*LILHS*	*St.M.*	*Rambam*
Pupil Evaluation Program	$ 305.00	$ 362.05	$ 389.27	$ 552.79
Basic Educational Data Services	101.00	47.74	5.52	66.83
Regents Examinations	119.00	459.59		
Attendance Records	11,957.00	8,934.92	5,307.07	5,102.62
Secondary School Reports	87.00	53.79		
Other	507.00			
Total	$13,076.00	$9,838.09	$5,701.86	$5,722.24

The Forms SA-186 and SA-187, which the schools were required to file in conformity with Chapter 507, set forth in detail how these figures were arrived at.[16] The Form SA-187 shows that the aggregate costs of LaSalle Academy for all instructional and attendance-reporting salaries and fringe benefits, for example, were $750,379.00 in contrast to the $13,000 reimbursed by the State and that the aggregate costs of St. Michael School, to take another example, were $179,219.19 as opposed to the $5,700 in reimbursement. Clearly, the state reimbursement represents a very small percentage of the schools' total expenses.

[16] *See* Stipulation of Facts, Exhibits 57-60 and the Responses of Intervenor-Defendants LaSalle Academy, Long Island Lutheran High School, St. Michael School and Yeshivah Rambam to Plaintiffs' Interrogatories which are on file in the Office of the Clerk of the Court as part of the Record on Appeal.

The District Court's Decision Upholding the Constitutionality of Chapter 507

Upon this Court's remand to the District Court for further proceedings in light of the *Wolman* decision, plaintiffs moved for a preliminary injunction against any payments to religiously-affiliated schools under Chapter 507. On September 14, 1977, the District Court, after argument, ordered that, during the pendency of the lawsuit, all such payments were to be paid to, and held in escrow by, the Comptroller of the State of New York.[17] Thereafter, upon receipt of the Stipulation of Facts described above, and after briefing and argument, the District Court held (Judge Ward dissenting) that Chapter 507 does not violate the Establishment Clause.

The majority opinion by Judge Mansfield found that Chapter 507 "clearly manifests a secular legislative purpose"[18], and, based on a close analysis of the various testing and attendance materials and the respective activities of state and nonpublic school personnel in connection therewith, found that "any benefit to religious indoctrination" was not the primary effect of the statute, but was "at best 'indirect' and 'incidental' to the secular value of the exams". 461 F. Supp. at 1129. The District Court further rejected the contention that the statute was invalid because it involved direct monetary payments to religiously-affiliated schools:

> . . . Although the Supreme Court has on occasion noted the absence of authorization for direct payment to a sectarian school as a factor to be considered, see *Wolman, supra,* 433 U.S. at 253; *Lemon, supra,* 403

[17] *See* Appendix, p. 6a.

[18] 461 F. Supp. at 1126.

> at 621; and *Everson v. Board of Education,* 330 U.S. 1, 18 (1947), the Court has never declared a statute unconstitutional because of its presence. Putting aside the question of whether direct financial aid can be administered without excessive entanglement by the State in the affairs of a sectarian institution, there does not appear to be any reason why payments to sectarian schools to cover the cost of specified activities would have the impermissible effect of advancing religion if the same activities performed by sectarian school personnel without reimbursement but with State-furnished materials have no such effect. We have already determined that the State does not promote religious education by furnishing and allowing sectarian staff members to grade State-prepared exams. Accordingly, the State does not improperly promote religion when it reimburses the schools for the cost of administering the exams. *Id.*
>
> * * *
>
> In sum a statute does not foster religious education simply because it provides aid in cash rather than in kind. (461 F. Supp. at 1130)

With respect to reimbursement for attendance record-keeping,[19] the District Court found that this is "essentially a ministerial task lacking ideological content or use"[20] and

[19] These records (*see* Exhibit 35 to the Stipulation of Facts) are maintained on a daily basis, reflecting pupil attendance during the day, rather than at specific classes. In view of the requirements as to secular subjects required to be taught in New York's nonpublic schools, any benefit accruing because of a pupil's attendance at a religion class in the course of a day principally devoted to secular subjects is incidental to the recognized need to maintain such attendance records for clearly secular purposes.

[20] 461 F. Supp. at 1130.

not susceptible of challenge either under the *Meek v. Pittenger* rationale that "any state assistance to the educational process advances religion" or on the theory that such reimbursement "frees up" funds for the religious, as contrasted to the secular, aspects of the schools. *Id.*

The District Court analyzed with particular care this Court's recent decisions and expressed the view that this Court's decision in *Wolman v. Walter,* 433 U.S. 229 (1977), rejected the theory, set forth in *Meek v. Pittenger,* 421 U.S. 349 (1975), that "State support for educational activities [in religiously-affiliated schools] necessarily advances religion". 461 F. Supp. at 1128.

With respect to the administration of the state-prepared examinations, the "overwhelming majority" of the Regents comprehensive achievement examination questions, as found by the District Court, consist of "objective inquiries requiring the student to choose between multiple answers, which leave no room for any possible religious indoctrination." *Id.* Although some of the examinations may also include "among scores of multiple choice questions" an essay-type question, "which conceivably could be used by an instructor to gauge a student's grasp of religious ideas and grade the answer accordingly"[21], the District Court found that

> the likelihood of such an event is so minimal and the State procedures designed to guard against serious inconsistencies in grading are so complete that there is no "substantial risk that these examinations . . . will [be administered] with an eye, unconsciously or

[21] 461 F. Supp. at 1128. Exhibit 31 to the Stipulation is a sample of the type of the state-prepared rating guide which accompanies Regents examinations, setting forth the State's guidelines for the grading of any essay question.

> otherwise, to inculcate students in the religious precepts of the sponsoring church." *Levitt I, supra,* 413 U.S. at 480. Moreover the State's guidelines for each achievement test and the review procedures . . . provide an adequate check against any misuse of essay questions.
>
> In short, any benefit to religious indoctrination from the administration of the State examinations by sectarian personnel is at best "indirect" and "incidental" to the secular value of the exams. (461 F. Supp. at 1128-29) (footnote omitted)

With regard to the Pupil Evaluation Program (PEP), the District Court concluded that

> the tests administered . . . consist entirely of objective, multiple choice questions which can be graded by machine and, even if graded by hand, afford the schools no more control over the results than if the tests were graded by the State. 461 F. Supp. at 1128.

With regard to the Regents Scholarship and College Qualification Test (RSCQT), the District Court found that

> the risk of their being used for religious purposes through grading is non-existent, since they are corrected entirely by State Education Department personnel. *Id.*

Having determined that the "principal or primary effect" part of the tripartite test applied in numerous cases from *Lemon v. Kurtzman,* 403 U.S. 602 (1971), to *Wolman v. Walter* remains determinative and that Chapter 507 meets this test, the District Court proceeded

to consider the plaintiffs' claim that the statute excessively entangles the State in the administration of religiously-affiliated institutions, an issue which it did not need to reach in its prior decision. In so doing,[22] the Court held that the activities reimbursed under Chapter 507 "did not pose any substantial risk of such entanglement"[23] and explained:

> The services for which the private schools would be reimbursed are discrete and clearly identifiable. A teacher's taking of attendance, administration of examinations, and record-keeping can hardly be confused with his or her other activities. Although there might be a possibility of fraud or mistake in the records submitted by private schools of the teachers' time spent on such activities, the careful auditing procedures anticipated by § 7 of the Statute should provide an adequate safeguard against inflated claims. In addition, since the services subsidized under the Statute are highly routinized, costs of the services for a given size of class should vary little from school to school, thus enabling the State to check claims filed by private schools against records maintained by hundreds of public schools under State supervision. (461 F. Supp. at 1131)

Judge Ward dissented on the basis that *Wolman* does not represent any change in the view expressed in *Meek* to the effect that any direct aid to religiously-affiliated schools necessarily advances their religious aspect and is

[22] The District Court dismissed the possibility of political entanglement, which it observed "has not been suggested by the parties" as posing a factor of sufficient consequence to warrant invalidation of the legislation. *See* 461 F. Supp. at 1131, n.9.

[23] *See* 461 F. Supp. at 1130.

unconstitutional. *See* 461 F. Supp. at 1133-35. He further was of the view that Chapter 507 involves excessive administrative entanglement between church and state. *See* 461 F. Supp. at 1135-38.

Following the entry of Final Judgment and the filing of appellants' Notice of Appeal to this Court, the state defendants sought clarification as to the status of the District Court's escrow order of September 14, 1977. On February 5, 1979, the District Court continued this order in effect for a period of 60 days to permit the plaintiffs time to file their Jurisdictional Statement,[24] and it informed them that any application for a further extension of the escrow order or for a stay against payments under Chapter 507 would have to be directed to this Court. On March 21, 1979, after filing their Jurisdictional Statement, appellants made a motion in this Court for a stay of the District Court's Judgment. The motion was denied on April 2, 1979, with Mr. Justice Powell taking no part in the consideration thereof. 99 S.Ct. 1785 (1979).

On June 11, 1979, this Court noted probable jurisdiction. 61 L.Ed.2d 295 (1979).

[24] *See* Appendix, p.7a.

Summary of Argument

In enacting Chapter 507, the New York Legislature adhered strictly to the dictates of this Court's decision in *Levitt v. Comm. for Pub. Educ. & Religious Liberty,* 413 U.S. 472 (1973). In so doing, it eliminated the causes for constitutional concern expressed in that case. Reimbursement of nonpublic schools for the actual costs incurred in filing various required attendance reports and forms with the State and in administering standardized state mandated and prepared examinations fulfills the secular purpose of ensuring that nonpublic school pupils receive a secular education in compliance with the New York Education Law, and both the content of the tests and the method of their administration preclude any realistic claim that the religious aspects of the schools are thereby advanced.

This Court's decision in *Wolman v. Walter,* 433 U.S. 229 (1977), should be viewed as rejecting the concept that any state support for educational activities necessarily advances religion. The Court has repeatedly rejected claims that otherwise permissible programs are invalid because they involve a financial payment which may have the effect of freeing other funds for use in furthering religious aspects of nonpublic schools.

Compliance with and enforcement of Chapter 507 do not pose an unacceptable risk of excessive entanglement between church and state in view of the requirements for submission by the schools of vouchers and supporting data as to actual costs incurred, on the basis of which any State audit can be conducted with minimal, if any, interference or involvement in the educational or religious activities of the schools.

Chapter 507 is in all respects consistent with this Court's tripartite test, as most recently applied in *Wolman v. Walter,* and the Judgment of the District Court should be affirmed.

ARGUMENT

Chapter 507 Does Not Advance Religion, Nor Does It Entail Excessive Entanglement Between Church and State

The fundamental issue presented by this appeal is whether, as indicated in *Meek v. Pittenger,* 421 U.S. 349 (1975), any direct payments, as under Chapter 507, to a religiously-affiliated school are prohibited on the ground that they advance religion—or, as the District Court reasoned and as we urge, the proper test is whether the principal or primary effect of such aid is the advancement of religion—a test applied in numerous cases from *Lemon v. Kurtzman,* 403 U.S. 602 (1971), to *Wolman v. Walter,* 433 U.S. 229 (1977).

A further issue is whether Chapter 507, as administered by the State Education Department, involves excessive entanglement between church and state. A subsidiary issue, not raised below, is whether the statute gives rise to political divisiveness.

The District Court concluded, correctly we submit, that Chapter 507 fully complies with the tripartite test[25] ap-

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[25] In view of the recognized and legitimate interest on the part of the State of New York in ensuring adequate levels of secular instruction and attendance in nonpublic schools closely regulated as to secular curriculum and related matters, we submit that the District Court's conclusion that Chapter 507 has a secular legislative purpose is entirely correct. *See* 461 F.Supp. at 1126. Appellants do not seriously contend otherwise. *Cf.* Brief for Appellants, pp. 8-9.

plied most recently in *Wolman v. Walter* and dismissed the complaint.

In *Meek,* this Court indicated a possible modification of the "principal or primary effect" portion of this test in holding (by a divided Court) that Pennsylvania's statutory program for the loan of secular instructional material and equipment to nonpublic schools violated the Establishment Clause because it aided the "integrated secular and religious", "inextricably intertwined" education at these schools. 421 U.S. at 366. This Court's opinion stated:

> . . . For this reason, Act 195's direct aid to Pennsylvania's predominantly church-related, nonpublic elementary and secondary schools, even though ostensibly limited to wholly neutral, secular instructional material and equipment, inescapably results in the direct and substantial advancement of religious activity, cf. *Committee for Public Education & Religious Liberty v. Nyquist,* 413 U.S., at 781-783, and n.39, and thus constitutes an impermissible establishment of religion. (421 U.S. at 366)

Several years later, in *Wolman,* this Court considered the constitutionality of an Ohio statute[26] providing, among other things, for the supply by the State to nonpublic schools of standardized tests and scoring services, identical to those used in the public schools. In an

[26] Ohio Rev. Code § 3317.06 (1976). The biennial appropriation under this statute was $88,800,000. *See* 433 U.S. at 233.

opinion by Mr. Justice Blackmun (joined by the Chief Justice, Mr. Justice Stewart and Mr. Justice Powell) that section was found to be constitutional:[27]

> In *Levitt v. Committee for Public Education,* 413 U.S. 472 (1973), this Court invalidated a New York statutory scheme for reimbursement of church-sponsored schools for the expenses of teacher-prepared testing. The reasoning behind that decision was straightforward. The system was held unconstitutional because "no means are available, to assure that internally prepared tests are free of religious instruction." *Id.* at 480.
>
> There is no question that the State has a substantial and legitimate interest in insuring that its youth receive an adequate secular education. *Id.* at 479-480, n.7. The State may require that schools that are utilized to fulfill the State's compulsory education requirement meet certain standards of instruction, *Allen,* 392 U.S., at 245-246, and n.7, and may examine both teachers and pupils to ensure that the State's legitimate interest is being fulfilled. *Levitt,* 413 U.S. at 479-480, n.7; *Lemon,* 403 U.S., at 614. See App. 28. Cf. *Pierce v. Society of Sisters,* 268 U.S. 510, 534 (1925). Under the section at issue, the State provides both the schools and the school district with the means of ensuring that the minimum standards are met. The nonpublic school does not control the content of the test or its result. This serves to prevent the use of the test as a part of religious teaching, and thus avoids that kind of direct aid to religion found present in *Levitt.* Simi-

[27] Mr. Justice White and Mr. Justice Rehnquist concurred in the judgment with respect to the testing and scoring services. *See* 433 U.S. at 255.

larly, the inability of the school to control the test eliminates the need for the supervision that gives rise to excessive entanglement. We therefore agree with the District Court's conclusion that § 3317.06(J) is constitutional. (433 U.S. at 239-41) (footnote omitted)

I

In analyzing this Court's decisions in *Meek* and *Wolman,* the District Court herein concluded that:

> Although *Wolman* does not expressly renounce *Meek's* theory that aid to a sectarian school's education activities is *per se* unconstitutional, it does revive the more flexible concept that state aid may be extended to such a school's educational activities if it can be shown with a high degree of certainty that the aid will only have secular value of legitimate interest to the State and does not present any appreciable risk of being used to aid transmission of religious views. See 433 U.S. at 240, 244, 247-48, 251, 254. (461 F.Supp. at 1127) (footnotes omitted)

We submit that this conclusion is correct as a matter of constitutional law and as a matter of practical educational imperatives. To apply the *Meek* approach is to impose on nonpublic schools an inflexible *per se* rule against any aid except in the limited area of general health and welfare involving police and fire protection, health care and the like.

This approach, by no means supported by the history of the First Amendment, would effectively eliminate any meaningful public assistance to the secular educational activities and progress of the millions of children who attend nonpublic schools. To apply the *Meek* approach is to place nonpublic schools and their pupils at a disadvantage in maintaining parity, wholly apart from excellence, with public schools and their pupils. This would not only be wrong as a matter of constitutional law, it would also constitute educational discrimination against students in religiously-affiliated schools and a hostile attitude toward fundamental educational needs which are met by nonpublic schools.[28] As Mr. Justice Powell observed in his opinion in *Wolman:*

> Our decisions in this troubling area draw lines that often must seem arbitrary. No doubt we could achieve greater analytical tidiness if we were to accept the broadest implications of the observation in *Meek v. Pittenger,* 421 U.S. 349, 366 (1975), that "[s]ubstantial aid to the educational function of [sectarian] schools . . . necessarily results in aid to the sectarian enterprise as a whole." If we took that course, it would become impossible to sustain state aid of any kind—even if the aid is wholly secular in character and is supplied to the pupils rather than the institutions. *Meek* itself would have to be overruled, along with *Board of Education v. Allen,* 392 U.S. 236 (1968), and even perhaps *Everson v. Board of Education,* 330 U.S. 1 (1947). The persistent

[28] In 1978, of 3,778,039 elementary and secondary school pupils in New York, 588,258 or 15.6 percent were being educated in religiously-affiliated schools. *See* N.Y. State Educ. Dep't.—Information Center on Educ., *Nonpublic School Enrollment and Staff—New York State 1977-78,* pp. 3, 6. This percentage is higher in metropolitan areas. *Cf. id.* at 7-8.

With respect to urban areas, 75 percent of the children in Roman Catholic elementary schools in Manhattan, for example, are black or Hispanic; in the Bronx, more than 50 percent are black or Hispanic. *See, e.g.,* N.Y. Times, June 3, 1979, § 1 at 34, col. 3.

> desire of a number of States to find proper means of helping sectarian education to survive would be doomed. This Court has not yet thought that such a harsh result is required by the Establishment Clause. Certainly few would consider it in the public interest. Parochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some States they relieve substantially the tax burden incident to the operation of public schools. The State has, moreover, a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them. (433 U.S. at 262)

Prior decisions of this Court have looked, not to whether *any* aid was given to nonpublic schools, but rather whether the primary effect of such aid was to advance or inhibit religion. We submit that this approach, reflected most recently in *Wolman,* is correct and will provide this Court with flexibility in dealing with future cases without endangering Establishment Clause values.

In addition, the *Meek* approach that any substantial aid to the secular functions of the religiously-affiliated schools necessarily aids the religious aspects of those schools must be premised on the theory that such aid frees other funds for use in the religious areas of the schools' activities. Yet this Court has repeatedly rejected claims that otherwise permissible programs are invalid because they involve a financial payment. For example, in *Tilton v. Richardson,* 403 U.S. 672 (1961), Chief Justice Burger stated in his lead opinion:

> The simplistic argument that every form of financial aid to church-sponsored activity violates the Religion Clauses was rejected long ago in *Bradfield v. Roberts,* 175 U.S. 291 (1899). There a federal construction grant to a hospital operated by a religious order was upheld. (403 U.S. at 679)

In *Hunt v. McNair,* 413 U.S. 734 (1973), Mr. Justice Powell pointed out that

> the Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends. (413 U.S. at 743)

In *New York v. Cathedral Academy,* 434 U.S. 125 (1977), Mr. Justice Stewart stated the matter as follows:

> . . . [T]his Court has never held that freeing private funds for sectarian uses invalidates secular aid to religious institutions . . .[29]

Indeed, in *Meek v. Pittenger,* 421 U.S. 349 (1975), this Court reminded us that

> it is clear that not all legislative programs that provide indirect or incidental benefit to a religious institution are prohibited by the Constitution. (421 U.S. at 359)

The correct test of constitutionality is whether the *principal* or *primary effect* of a statute is the advancement of religion, and not whether there is *any* such effect. Certainly, after *Wolman,* there should not be any

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[29] 434 U.S. at 134, citing *Roemer v. Bd. of Pub. Works of Maryland,* 426 U.S. 736, 747 n.14 (1976).

claim that non-ideological state-required programs such as the maintenance of attendance records or the use of standardized state-prepared examinations in nonpublic schools offend the Establishment Clause, nor should there be any claim that use of public funds in support thereof is unconstitutional. As the District Court pointed out in a very practical way:

> . . . In sum a statute does not foster religious education simply because it provides aid in cash rather than in kind. (461 F.Supp. at 1130)

Given the fact that, under *Wolman,* nonpublic schools can receive non-ideological testing materials paid for by the state, there is no legitimate reason under the First Amendment why the state cannot reimburse nonpublic schools for the expense which they incur in administering these tests.

Certainly, the fact of direct monetary payments to the schools is relevant, but it is by no means the end of the inquiry. Unless one is to accept the *Meek* approach, the proper test is whether such payments, as opposed to payments in terms of materials or other non-cash benefits, have the principal or primary effect of advancing religion. The District Court correctly rejected the *Meek* approach:

> The second distinction between the Ohio statutory provision upheld in *Wolman* and the New York Statute is that the latter, unlike the former, authorizes direct reimbursement to non-public schools for their administration of the exams and for attendance-taking. Although the Supreme Court has on occasion noted the absence of authorization for direct payment to a sectarian school as a factor to be considered, see *Wolman, supra,* 433 U.S. at 253; *Lemon, supra,* 403

> [U.S.] at 621; *Everson v. Board of Education,* 330 U.S. 1, 18 (1947), the Court has never declared a statute unconstitutional because of its presence. Putting aside the question of whether direct financial aid can be administered without excessive entanglement by the State in the affairs of a sectarian institution, there does not appear to be any reason why payments to sectarian schools to cover the cost of specified activities would have the impermissible effect of advancing religion if the same activities performed by sectarian school personnel without reimbursement but with State-furnished materials have no such effect. We have already determined that the State does not promote religious education by furnishing and allowing sectarian staff members to grade State-prepared exams. Accordingly, the State does not improperly promote religion when it reimburses the schools for the cost of administering the exams. (461 F.Supp. at 1129)

Nor can there be any claim that Chapter 507 advances religion by permitting religious intrusion into the grading of the state-prepared standardized examinations. The RSQCT examinations have been graded by State personnel. The PEP examinations consist of objective, multiple choice questions which can be graded by machine or, if by hand, "afford the schools no more control over the results than if the tests were graded by the State". 461 F.Supp. at 1128. Similarly, the Regents' examinations, for the most part, consist of multiple choice questions. As to the few questions, the District Court found that the state procedures, including guidelines for grading, are adequate to guard against serious inconsistencies which conceivably

might arise from an individual grader's religious (or other) interests.[30] As the District Court concluded:

> In short, any benefit to religious indoctrination from the administration of the State examinations by sectarian personnel is at best "indirect" and "incidental" to the secular value of the exams. (461 F.Supp. at 1129)

Similarly, the District Court's conclusions as to the non-ideological nature and effect of the attendance and related reports is correct, as a matter of constitutional law and common sense.[31] It is indeed difficult, except under the approach taken in *Meek,* to find that "head counts" have anything to do with the transmission of educational information or values—secular or sectarian. These reports, and the activities incident to them, involve "ministerial task(s) lacking ideological content or use"[32] and cannot properly be considered as having any effect—much less a primary effect—of advancing religion.

We therefore submit that the "primary effect" of reimbursement under Chapter 507 for the expense of administering state-prepared standardized examinations and of

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[30] 461 F.Supp. at 1129. Furthermore, the pupils do not see their papers after they have been graded since the papers are returned to the State Education Department.

[31] The record showed and the District Court found that:

> The lion's share of the reimbursements to private schools under the Statute would be for attendance-reporting. According to applications prepared by intervenor-defendant private schools for the 1973-1974 school year, between 85% and 95% of the total reimbursement is accounted for by the costs attributable to attendance-taking, of which all but a negligible portion represents compensation to personnel for this service. (461 F.Supp. at 1126)

[32] 461 F.Supp. at 1130.

compiling state-required attendance and related reports is the furtherance of the required secular education of children in nonpublic schools.

II

Having determined that Chapter 507 does not advance religion, the District Court concluded that the activities reimbursed by the statute "do not pose any substantial risk of . . . entanglement". 461 F.Supp. at 1130 (footnote omitted). This conclusion is correct. The State's activities with respect to reporting and testing do not involve intrusion into the daily activities of the nonpublic schools except to receive by mail attendance and related reports and to arrange for the administration of the state-prepared examinations by the schools and the transmission of test papers and results to the Education Department. As the District Court noted:

> The services for which the private schools would be reimbursed are discrete and clearly identifiable. A teacher's taking of attendance, administration of examinations, and record-keeping can hardly be confused with his or her other activities. (461 F.Supp. at 1131)
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> * * *
>
> . . . [T]he opportunity for religious indoctrination in the grading of end-of-course regents examinations is virtually nil. As we have noted, these examinations, given but once a year in any one class, require the grader to exercise subjective judgment only in connection with one, or possibly two, questions out of scores. These questions are prepared by the State, which provides instructions to guide the grading of

> essay questions. Clearly, the potential for advancing religion associated with the subsidized activities in this case is vastly inferior to that which the Court faced in *Lemon*. (461 F.Supp. at 1131, n.8)

Similarly, there is no intrusion by the State into the schools as a result of the process of submitting vouchers reflecting actual costs and the audit of such vouchers. The District Court concluded:

> . . . Although there might be a possibility of fraud or mistake in the records submitted by private schools of the teachers' time spent on such activities, the careful auditing procedures anticipated by § 7 of the Statute should provide an adequate safeguard against inflated claims. In addition, since the services subsidized under the Statute are highly routinized, costs of the services for a given size of class should vary little from school to school, thus enabling the State to check claims filed by private schools against records maintained by hundreds of public schools under State supervision. (461 F.Supp. at 1131)

Contrary to appellants' claim at pages 15-16 of their Brief, Chapter 507 does not involve any "continuing state surveillance of church school operations". It simply involves a relationship whereby the State, as the contractor, has the right to verify the "actual cost" of the required services which the schools perform under Chapter 507. The District Court concluded that this can hardly be a complicated audit because the "highly routinized" activities involved would permit the State to determine readily if any school's reimbursement vouchers varied materially from those submitted by other similar schools. 461 F.Supp. at 1131.

Thus, any administrative entanglement between church and state is at most minimal, is tailored to the simple verification requirement imposed on any vendor to the State, and is hardly the "excessive entanglement" required to invalidate a statute. *See, e.g., Lemon v. Kurtzman*, 403 U.S. at 621.

III

Appellants attempt to overcome the sound reasoning of the majority of the District Court by referring to two cases decided by this Court after its decision in *Wolman*, namely, *New York v. Cathedral Academy*, 434 U.S. 125 (1977), and *NLRB v. Catholic Bishop of Chicago*, 99 S.Ct. 1313 (1979). Neither case is apposite.[33]

In the later case, this Court simply determined that Congress did not contemplate, in enacting the National Labor Relations Act, that the NLRB would require religiously-affiliated schools to grant recognition to unions as bargaining agents for their teachers, and noted the very real potential for administrative entanglement if such were the case.

Cathedral Academy involved an effort by the New York Legislature to correct an inequity it considered to have existed as a result of the timing of the entry of the District Court judgment in *Comm. for Pub. Educ. & Re-*

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[33] Appellants' reliance on *Byrne v. Pub. Funds for Pub. Schools of New Jersey*, 61 L.Ed.2d 273 (1979), is also misplaced because it was a tax credit case which simply applied the prior decision of this Court in *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), and, arguably, in *Pub. Funds for Pub. Schools of New Jersey v. Marburger*, 358 F.Supp. 29 (D.N.J. 1973), *aff'd*, 417 U.S. 961 (1974).

ligious Liberty v. Levitt, 342 F. Supp. 439 (S.D.N.Y. 1972). This Court held that the original constitutional infirmity in the Mandated Services Act, namely, reimbursement of expenses incurred in administering teacher-prepared exams, was retained in the new statute,[34] thereby also retaining either the same potential advancement of religion through such examinations or potential entanglement of the State with nonpublic schools in determining through litigation in the state courts the ideological or non-ideological content of those examinations. *See New York v. Cathedral Academy,* 434 U.S. at 133.

Nor is there any validity to Judge Ward's thesis herein, based on his suggested extension of the rationale of *Cathedral Academy,* that the Establishment Clause requires frequent review of the testing materials to ensure neutrality of the State aid. *See* 461 F. Supp. at 1135-38. This fails to take into account the basic difference between the teacher-prepared testing materials involved in *Cathedral Academy* and previously in *Levitt* and the state-prepared materials involved here. The District Court majority stated in this regard:

> We see no indication in either of these decisions [*Levitt* and *Cathedral Academy*] that the State would have to make individual determinations regarding the neutrality of State-prepared examinations. Indeed, in *Wolman* the Court recognized as a general rule that the performance by state personnel of their functions outside of the sectarian school environment does not present any significant danger of promoting religious values, even when their functions relate directly to the educational process. 433 U.S. at 247-48. Accordingly, in the absence of any reason for believing that State-prepared examinations here might

[34] [1972] Laws of N.Y. ch. 996.

> be radically changed to elicit or encourage religious views, our determination that the examinations do not foster religion should be definitive. (461 F. Supp. at 1129, n.7)

We therefore submit that there is no basis for appellants' strained claims of administrative "entanglement".

IV

Appellants' Brief raises for the first time the argument that Chapter 507 is unconstitutional because of claimed "political entanglement" or "divisiveness". No evidence is offered in support of this claim, and the argument rests simply on an extended quotation from *Lemon v. Kurtzman,* 403 U.S. at 622-24, together with the conclusory statement that:

> . . . The combination of potential for political entanglement together with the administrative entanglement necessary to ensure that the state-compensated services do not advance religion compels the conclusion that Chapter 507, with or without Section 7, violates the Establishment Clause.[35]

This argument is erroneous and, also, should not be considered by this Court in view of appellants' failure to raise it below, as specifically noted by the District Court.[36]

[35] Brief for Appellant, pp. 17-18.

[36] *See* 461 F.Supp. at 1131, n.9. Absent special circumstances, this Court will not consider issues not raised initially below. *E.g., Youakim v. Miller,* 425 U.S. 231, 234-36 (1976); *Singleton v. Wulff,* 428 U.S. 106, 119-21 (1976). Appellants show no exceptional circumstances or danger of manifest injustice which would justify a departure from this basic principle of the Court's appellate jurisdiction.

In any event, appellants' belated claim of political divisiveness furnishes no basis for invalidating Chapter 507. There is absolutely no evidence that Chapter 507 or any appropriations for it have engendered any political strife along religious lines or, indeed, any other lines. The statute was first enacted by very substantial majorities of both houses of the New York Legislature in 1974,[37] and appropriations have been enacted thereafter on a routine basis. Indeed, in view of the limited nature of the services reimbursed under Chapter 507, the appropriations have remained constant.

The "political divisiveness" concept remains unsettled and has a very real potential for conflict with other First Amendment rights and values. It therefore should not be invoked lightly where, as here, there is nothing more than speculation on the part of appellants and a rejection of that speculation by the District Court. As to such speculation, the proper answer is that given by Mr. Justice Powell in *Wolman:*

> . . . The risk of significant religious or denominational control over our democratic processes—or even of deep political division along religious lines—is remote, and when viewed against the positive contributions of sectarian schools, any such risk seems entirely tolerable in light of the continuing oversight of this Court. (433 U.S. at 263)

[37] *See supra*, p. 6, n.7 and accompanying text.

Conclusion

In view of the foregoing, the Judgment appealed from should be affirmed.

Dated: New York, New York
September 14, 1979

Respectfully submitted,

RICHARD E. NOLAN
Attorney for Appellees Horace Mann-Barnard School, La-Salle Academy, Long Island Lutheran High School and St. Michael School
1 Chase Manhattan Plaza
New York, New York 10005
Tel.: (212) 422-3400

THOMAS J. AQUILINO, JR.
THOMAS A. SCHWEITZER
Of Counsel

APPENDIX

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Three-Judge Court

74 Civ. 2648 RJW
Opinion No. 47973

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BARBARA BROOK, NAOMI COWEN, ROBERT B. ESSEX, FLORENCE FLAST, CHARLOTTE GREEN, HELEN HENKIN, MARTHA LATIES, BLANCHE LEWIS, ELLEN MEYER, REV. ARTHUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, HOWARD M. SQUADRON, CHARLES H. SUMNER and CYNTHIA SWANSON,

Plaintiffs,

—against—

ARTHUR LEVITT, as Comptroller of the State of New York, and EWALD B. NYQUIST, as Commissioner of Education of the State of New York,

Defendants,

—and—

HORACE MANN-BARNARD SCHOOL, LASALLE ACADEMY, LONG ISLAND LUTHERAN HIGH SCHOOL, ST. MICHAEL SCHOOL and YESHIVAH RAMBAM,

Intervenor-Defendants.

APPEARANCES

Leo Pfeffer, Esq.
(Atty. for Plaintiffs)
15 East 84th Street
New York, NY 10028

Louis J. Lefkowitz, Attorney General of
the State of New York
(Atty. for Defendants)
Department of Law
Albany, NY 12224
By: Jean M. Coon, Assistant
Solicitor General

Davis Polk & Wardwell
(Attys. for Intervenor-Defendants
Horace Mann-Barnard School, LaSalle
Academy, Long Island Lutheran
High School and St. Michael
School)
1 Chase Manhattan Plaza
New York, NY 10005
Richard E. Nolan, Esq., Thomas J.
Aquilino, Jr., Esq. of counsel

Dennis Rapps, Esq.
(Atty. for Intervenor-Defendant
Yeshivah Rambam)
National Jewish Commission on
Law and Public Affairs
66 Court Street
Brooklyn, NY 11201

Before:

MANSFIELD, *Circuit Judge,*
LASKER and WARD, *District Judges.*

MANSFIELD, *Circuit Judge:*

For the second time we are required to pass upon the constitutionality of Chapter 507, as amended by Chapter 508, of the 1974 Laws of New York ("the Statute"), which authorizes the State to reimburse private schools for the cost of performing certain state-mandated pupil testing and record keeping. The statute has its background in *Levitt v. Committee for Public Education,* 413 U.S. 472 (1973) (*Levitt I*), where the Supreme Court struck down an earlier New York statute on the same subject as violative of the First Amendment's Establishment Clause, applicable to the states through the Fourteenth Amendment, on the grounds that it authorized State financing of tests prepared by sectarian school teachers which might be used for religious instruction and that the Statute had no auditing provisions designed to insure that sectarian schools would be reimbursed by the State only for secular services.

In 1974 the New York legislature responded by enacting the Statute presently under review, which sought to remedy the features found objectionable by the Supreme Court by providing for State preparation of the tests and auditing procedures to assure that private schools would be reimbursed only for these State-mandated services. Thereafter, in *Committee for Public Education and Religious Liberty v. Levitt,* 414 F. Supp. 1174 (1976) (*Levitt II*), we held that despite these changes the amended Statute did not pass muster under the Establishment Clause.[1] In doing so we relied heavily on *Meek v.*

[1] The plaintiffs' complaint also alleged that the Statute violated the Free Exercise Clause. That claim was not pressed in the first hearing of the case, and our decision on the Establishment Clause made it superfluous. The plaintiffs have not pressed the theory in the argument following remand, so

Pittenger, 421 U.S. 349 (1975), which postdated *Levitt I.* One year after our decision the Supreme Court decided *Wolman v. Walter,* 433 U.S. 229 (1977), following which it vacated our judgment in *Levitt II* and remanded the case for reconsideration in light of *Wolman.* Three justices voted to affirm our decision. 433 U.S. 902 (1977).[2]

Following remand we held an evidentiary hearing to receive proof relevant to the issues. With commendable cooperation the parties succeeded in agreeing upon the pertinent evidence which was then furnished to us in the form of a stipulation of facts and exhibits. Since *Wolman* has in our view relaxed some of *Meek's* constitutional strictures against state aid to sectarian schools we now conclude, upon application of *Wolman's* standards to the record before us, that amended Chapter 507 may be upheld as constitutional.

The amended Statute, which became effective July 1, 1974, provides for reimbursement to private schools of the "actual cost" of complying with State requirements for public attendance reporting and the administration of State-prepared standardized examinations such as Regents examinations and the pupil evaluation program. These reports and tests are required of public and private schools alike and are designed to improve the educational program offered in New York schools.

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we have not addressed it. We do note that the Supreme Court has rejected previous attempts to invalidate public financial assistance to sectarian schools under the Free Exercise Clause. *Tilton v. Richardson,* 403 U.S. 672, 689 (1971); *Board of Education v. Allen,* 392 U.S. 236, 248-49 (1968).

[2] The vote of the other six Justices to vacate and remand does not express an opinion on the merits. See *Hunt v. McNair,* 413 U.S. 734 (1973).

The Statute authorizes reimbursements for two categories of services: the administration of State-prepared examinations and the execution of State-required reporting procedures. The State prepares a large number of examinations for use in evaluating the quality of the education received in New York schools and the abilities of individual students. At the present time, most of these tests are administered within one of three major examination programs. First, there is the Pupil Evaluation Program (PEP), consisting of standardized reading and mathematics achievement tests. These tests must be administered to all students in grades 3 and 6. Tests for ninth grade students are also prepared for use by schools on an optional basis. These tests are entirely multiple-choice, objective examinations and can be graded by hand or machine. Complete instructional manuals for giving and scoring the examinations are furnished to the school by the State. The scores are returned by school personnel to the State Education Department.

The second battery of tests are the comprehensive achievement tests (Regents "end-of-the-course" examinations) based on State courses of study for use in grades 9 through 12. Presently provided in 19 subjects,[3] these tests consist largely or entirely of objective questions with multiple-choice answers. Some of the examinations contain one or two essay questions or mathematical problems involving extended answers, which, of course, cannot be graded mechanically. Detailed instructional manuals are furnished by the State to schools for the administration

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[3] Biology; Bookkeeping and accounting II; Business law; Business mathematics; Chemistry; Earth science; English; French; German; Hebrew; Italian; Latin; Ninth year mathematics; Tenth year mathematics; Eleventh year mathematics; Physics; Shorthand II and transcription; Social Studies; and Spanish.

of these exams and rating guides for their scoring of them. Each school is required to submit the passing and failing papers in certain subjects to the State Education Department for review. After the March/April and August exam dates, schools return all completed exam papers. In January and June a random sampling procedure is used by the State to select completed examination papers for review.

The third principal set of examinations is the Regents Scholarship and College Qualification Test (RSCQT), which has been used as a basis for awarding scholarships to New York high school students and for admitting students to various units of the State University. All answer papers for the RSCQT are scored at the State Education Department.

The Statute also authorizes reimbursements to private schools for the cost of preparing informational reports required by State law. Each year, private schools must submit to the State a Basic Educational Data System (BEDS) report. This report contains information regarding the student body, faculty, support staff, physical facilities, and curriculum of each school. Schools are also required to submit annually a report showing the attendance record of each minor who is a student at the school. N.Y. Educ. Law § 3211 (McKinney).

Schools which seek reimbursement must "maintain a separate account or system of accounts for the expenses incurred in rendering" the reimbursable services, and they must submit to the N.Y. State Commissioner of Education an application for reimbursement with additional reports and documents prescribed by the Commissioner. Chapter 507, as amended, §§ 4-5. Reimbursable costs include proportionate shares of the teachers' salaries and fringe benefits attributable to administration of the examinations

and reporting of State-required data on pupil attendance and performance, plus the cost of supplies and other contractual expenditures such as data processing services. Applications for reimbursement cannot be approved until the Commissioner audits vouchers or other documents submitted by the schools to substantiate their claims. §§ 6-7. The Statute further provides that the State Department of Audit and Control shall from time to time inspect the accounts of recipient schools in order to verify the cost to the schools of rendering the reimbursable services. If the audit reveals that a school has received an amount in excess of its actual costs, the excess must be returned to the State immediately. § 7. It is estimated that the reimbursements to private schools under the Statute will amount to $8,000,000 to $10,000,000 a year.

The lion's share of the reimbursements to private schools under the Statute would be for attendance-reporting. According to applications prepared by intervenor-defendant private schools for the 1973-1974 school year, between 85% and 95% of the total reimbursement is accounted for by the costs attributable to attendance-taking, of which all but a negligible portion represents compensation to personnel for this service. However, the total amount paid for these attendance-taking services amounted to only approximately 1% to 5.4% of the total amount budgeted by the schools for salaries and fringe benefits.

Discussion

The late Justice Harlan once observed that "it is far easier to agree on the purpose that underlies the First Amendment's Establishment and Free Exercise Clauses than to obtain agreement on the standards that should

govern their application." *Walz v. Tax Commission,* 397 U.S. 664, 694 (1970). However, in *Lemon v. Kurtzman,* 403 U.S. 602 (1971), the Court established three criteria for a constitutional grant of State assistance to sectarian institutions: (1) the assistance program must have "a secular legislative purpose," (2) it must not have a "primary effect" of advancing or inhibiting religion, and (3) it must not excessively entangle the government in the affairs of sectarian institutions.

This now familiar tripartite test may have given some orderliness to Establishment Clause analysis, but for the most part it has simply identified more precisely the areas of uncertainty. Unfortunately, Justice Harlan's observation is as appropriate now as it was in 1970. We still face confusing and imprecise dictates. However, in such additional light as is shed by *Wolman,* we believe that the Statute here does not transgress the "blurred, indistinct and variable" limitations imposed upon federal and state governments by the Establishment Clause. 403 U.S. at 614.

As in *Levitt II,* we can pass quickly over the first leg of the Establishment Clause test. The statute clearly manifests a secular legislative purpose. See 414 F. Supp. at 1178. The central issue, as frequently happens in cases involving the Establishment Clause, is whether the Statute has a "primary purpose" (which includes a "direct and immediate effect," *Committee for Public Education & Religious Liberty v. Nyquist,* 413 U.S. 756, 783 n.39 (1973)), of advancing religion. In *Levitt II* we concluded that *Meek v. Pittenger, supra,* virtually mandated our holding that the Statute had such an effect, since the Supreme Court there ruled that "substantial aid to the educational function of [sectarian] schools . . . necessarily results in aid to the sectarian school enterprise as a

whole." If, as seemed to be the case, the Court considered the secular and religious dimensions of education provided in sectarian schools to be inseparable, it appeared to us to follow that direct aid to such schools, "even though ostensibly limited to wholly neutral, secular instructional material and equipment, inescapably results in the direct and substantial advancement of religious activity." 421 U.S. at 366. We reasoned that since administration of examinations and record keeping are "as much a part of the educational function of private schools as classroom instruction in secular subjects," the State subsidies for these secular functions aided the sectarian enterprise as a whole and thereby directly advanced religion. 414 F. Supp. at 1179-80.

The concept that religion so pervades lower sectarian schools that even wholly secular instruction or equipment is always subject to the risk of religious orientation, rendering separation of secular and religious educational functions extremely difficult, has repeatedly been posed by the Supreme Court as an inherent problem faced in determining the constitutionality of state aid to sectarian schools. See *Lemon v. Kurtzman,* 403 U.S. 602, 618-19 (1971); *Levitt I, supra,* 413 U.S. at 480; cf. *Tilton v. Richardson,* 403 U.S. 672, 680-81 (1970) (this concept inapplicable to church-affiliated colleges). It appeared to us that in *Meek* the Court, in lieu of a case-by-case analysis of evidence to assess the degree of risk that state aid might be used for religious purposes, was establishing a *per se* rule prohibiting *any* state aid to educational activities carried out in sectarian schools, except for the loan of textbooks to students, which was upheld in *Board of Education v. Allen,* 392 U.S. 236 (1968). Indeed Justice Stewart observed in his plurality opinion that the "diminished probability" that religious doctrine might

become intertwined with secular instruction would not render state aid permissible as long as the potential existed. 421 U.S. 370-71. Applied consistently, *Meek* would allow only state aid coming under the mantle of "general welfare" programs serving the health and safety of school children.[4] See *Wolman, supra,* 433 U.S. at 262 (Powell, J., concurring in part and dissenting in part).

Although *Wolman* does not expressly renounce *Meek's* theory that aid to a sectarian school's education activities is *per se* unconstitutional,[5] it does revive the more flexible concept that state aid may be extended to such a school's educational activities if it can be shown with a high degree of certainty that the aid will only have secular value of legitimate interest to the State and does not present any appreciable risk of being used to aid transmission of religious views.[6] See 433 U.S. at 240, 244, 247-48, 251, 254. It is this concept which we apply to the provisions of the statute before us.

In *Wolman* the Court upheld a section of an Ohio statute authorizing expenditure of State funds:

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[4] *Meek* did sustain the constitutionality of State expenditures for secular school textbooks to be loaned to sectarian school children or their parents. Such assistance, first sanctioned in *Allen, supra,* would be indefensible under a strict application of *Meek's* rationale. In *Wolman* the Court indicated that *Allen* is now followed solely in deference to *stare decisis* and, consequently, is limited to its facts.

[5] Indeed, Justice Blackmun's opinion for the Court in *Wolman* recites some of Justice Stewart's sweeping language in *Meek,* 433 U.S. at 249-50.

[6] Of course, this certainty must be achieved without an excessive entanglement of the State with the sectarian institution. We examine the entanglements issue separately, *infra,* pp. 16-17.

> "To supply for use by pupils attending nonpublic schools within the district such standardized tests and scoring services as are in use in public schools of the state." Ohio Rev. Code Ann. § 3317.06(j) (Supp. 1976).

The State of Ohio furnished the tests which were administered and scored by state personnel. Justice Blackmun reasoned that as the sectarian schools were unable to control the content or result of state-prepared examinations, there was no substantial danger that the exams would be used for religious teaching. 433 U.S. at 240. If, as the Court had asserted in *Meek,* the secular and religious dimensions of sectarian school education were inseparable, the examinations thus provided and graded by the State would have furthered religious education, even though they covered only secular subjects. *Wolman,* then, must be viewed as rejecting the concept that State support for educational activities necessarily advances religion.

In the present case all tests provided under the Statute, like those supplied under the Ohio law, are prepared by the State. However, except for the RSCQT exams, which are graded exclusively by personnel of the State Education Department, the tests furnished by New York State, unlike those supplied under the Ohio statute, are administered and graded by sectarian school personnel, for whose services in performing this task and in taking attendance the private schools are reimbursed by the State. The question, therefore, is whether these features of the New York law represent a sufficient distinction from *Wolman* to render it inapplicable and to call for nullification of the Statute. We think not. Although these features render the constitutionality of

the New York Statute a closer question than that presented by the Ohio law in *Wolman,* the risk of the New York examinations or services being diverted to religious purposes is altogether too insubstantial to require a departure from *Wolman.* The secular nature of the examinations and the almost entirely mechanical method prescribed for their administration as well as for attendance-taking precludes any substantial risk that the examinations or services will be used for injection or inculcation of religious views or principles, even in a pervasive religious atmosphere. The careful auditing procedure, moreover, insures that State aid will be restricted to these secular services.

Turning first to the RSCQT examinations, the risk of their being used for religious purposes through grading is nonexistent, since they are corrected exclusively by State Education Department personnel. The tests administered under the Pupil Evaluation Program (PEP) consist entirely of objective, multiple-choice questions, which can be graded by machine and, even if graded by hand, afford the schools no more control over the results than if the tests were graded by the State.

Similarly, the overwhelming majority of the questions on the comprehensive achievement tests consist of objective inquiries requiring the student to choose between multiple answers, which leave no room for any possible religious indoctrination. Although some of the comprehensive achievement examinations may, among scores of multiple-choice questions, have a question asking students to write an essay on one of several topics specified in the exam, which conceivably could be used by an instructor to gauge a student's grasp of religious ideas and to grade the answer accordingly, the likelihood of such an event is so minimal and the State procedures designed to guard

against serious inconsistencies in grading are so complete that there is no "substantial risk that these examinations . . . will [be administered] with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church." *Levitt I, supra,* 413 U.S. at 480. Moreover the State's guidelines for each achievement test and the review procedures (described above) provide an adequate check against any misuse of essay questions.[7]

In short, any benefit to religious indoctrination from the administration of the State examinations by sectarian personnel is at best "indirect" and "incidental" to the secular value of the exams. As the Supreme Court pointed out in *Nyquist, supra,* 413 U.S. at 771, "not every law

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[7] Our dissenting brother takes the view that a one-time annual review of the State-prepared examination materials will not suffice to ensure the neutrality of the State aid. Examinations prepared by State personnel for use in *all* schools in the State (public and private), however, unlike the examinations prepared by sectarian school teachers in *Levitt I,* do not present a "substantial risk" of being designed, unconsciously or otherwise, to further religious education. It was the presence of this risk that induced the Supreme Court to hold in *Levitt I* that the State could not reimburse sectarian schools for the cost of administering in-class examinations and to hold in *New York v. Cathedral Academy,* 434 U.S. 125 (1977), that the State could not provide reimbursements for costs incurred prior to the decision in *Levitt I* without making a detailed inquiry into the content of each examination, which itself would violate the Establishment Clause. See 413 U.S. at 480, 434 U.S. at 131.

We see no indication in either of these decisions that the State would have to make individual determinations regarding the neutrality of State-prepared examinations. Indeed, in *Wolman* the Court recognized as a general rule that the performance by state personnel of their functions outside of the sectarian school environment does not present any significant danger of promoting religious values, even when their functions relate directly to the educational process. 433 U.S. at 247-48. Accordingly, in the absence of any reason for believing that State-prepared examinations here might be radically changed to elicit or encourage religious views, our determination that the examinations do not foster religion should be definitive.

that confers an 'indirect,' 'remote,' or 'incidental' benefit upon religious institutions is for that reason alone, constitutionally invalid." In the absence of some other potential for diversion we fail to find the possible indirect benefit from this feature of the Statute sufficient to warrant its nullification.

The second distinction between the Ohio statutory provision upheld in *Wolman* and the New York Statute is that the latter, unlike the former, authorizes direct reimbursement to non-public schools for their administration of the exams and for attendance-taking. Although the Supreme Court has on occasion noted the absence of authorization for direct payment to a sectarian school as a factor to be considered, see *Wolman, supra,* 433 U.S. at 253; *Lemon, supra,* 403 at 621; and *Everson v. Board of Education,* 330 U.S. 1, 18 (1947), the Court has never declared a statute unconstitutional because of its presence. Putting aside the question of whether direct financial aid can be administered without excessive entanglement by the State in the affairs of a sectarian institution, there does not appear to be any reason why payments to sectarian schools to cover the cost of specified activities would have the impermissible effect of advancing religion if the same activities performed by sectarian school personnel without reimbursement but with State-furnished materials have no such effect. We have already determined that the State does not promote religious education by furnishing and allowing sectarian staff members to grade State-prepared exams. Accordingly, the State does not improperly promote religion when it reimburses the schools for the cost of administering the exams.

The Supreme Court's disapproval of statutes authorizing cash payments has turned on the fact that no reasonable guarantee was provided for insuring that the money

would be applied only to secular activities. See, e.g., *Levitt I, supra,* 413 U.S. at 480; *Nyquist, supra,* 413 U.S. at 774; *Lemon, supra,* 403 U.S. at 619-22. In each of these cases the Court found either that no effort had been made to restrict the benefit of the financial aid to wholly secular activities or that any efforts to do so would have involved an intolerable level of state surveillance of the sectarian institutions. *Levitt I, supra,* at 480; *Nyquist, supra,* at 780; *Lemon, supra,* at 620-22; cf. *Walz, supra,* 397 U.S. at 675. These decisions thus imply that direct cash payments are permissible if they serve exclusively secular purposes and do not involve excessive entanglement. For example, in *Levitt I,* where the Court struck down the predecessor to amended Chapter 507, the Court commented that the invalid lump-sum payments could not be reduced by a court to "an amount corresponding to the actual costs incurred in performing reimbursable secular services" because this "is a legislative, not a judicial, function." 413 U.S. at 482. The implication is that if the legislature chose to exercise its power to fund purely secular activities, the Court would not stand in the way. See *Nyquist, supra,* 413 U.S. at 774. In sum a statute does not foster religious education simply because it provides aid in cash rather than in kind.

Turning to the Statute's reimbursement of a sectarian school's attendance-taking, as distinguished from administration of examinations, since record-keeping is essentially a ministerial task lacking ideological content or use, it is not challengeable on *Meek's* theory that any state assistance to the educational process advances religion. Of course it might be argued that since sectarian schools would otherwise be required to expend funds for the taking and recording of attendance, they benefit to

the extent that reimbursement facilitates an activity that is essential to the conduct of the sectarian enterprise as a whole or at least "frees up" funds for religious purposes. The "freeing-up" argument, however, has been consistently rejected by the Supreme Court. See, e.g., *Nyquist, supra,* 413 U.S. at 775. Although record-keeping may be part of the operation of a sectarian school, we do not view it as approaching the status of a facility such as a classroom, which might be used for secular education, see *id.* In our view it is closer to the operation of buses for the transportation of children to sectarian schools, the cost of which may be reimbursed by the State without violation of the Establishment Clause. *Everson v. Board of Education, supra.* Although school busing may be analogized to "general welfare" services of the type upheld in *Meek* and *Wolman,* the Court in *Wolman* rationalized reimbursement for busing as permissible for the reasons that the activity is unrelated to any aspect of the curriculum and the school does not determine the frequency of the activity subsidized. 433 U.S. at 253. In view of *Wolman's* affirmation of this aspect of *Everson* we are satisfied that the State's subsidization of attendance-taking in the present case should be upheld, particularly in the absence of any suggestion that such record-keeping can be used to foster an ideological outlook.

Having concluded that amended Chapter 507 passes the primary-purpose test, we pass on to the question of whether it excessively entangles the State in the administration of sectarian institutions, an issue which we were not required to resolve in *Levitt II,* in view of our holding there. 414 F. Supp. at 1180.

Where a state is required in determining what aid, if any, may be extended to a sectarian school, to monitor the day-to-day activities of the teaching staff, to engage

in onerous, direct oversight, or to make on-site judgments from time to time as to whether different school activities are religious in character, the risk of entanglement is too great to permit governmental involvement. See, e.g., *Lemon, supra,* 403 U.S. at 619-22; *Meek, supra,* 421 U.S. at 370-71. The activities subsidized under the Statute here at issue, however, do not pose any substantial risk of such entanglement.[8]

The services for which the private schools would be reimbursed are discrete and clearly identifiable. A teacher's taking of attendance, administration of examinations, and record-keeping can hardly be confused with his or her other activities. Although there might be a possibility of fraud or mistake in the records submitted by private schools of the teachers' time spent on such activi-

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[8] We do not believe that the State must review every examination paper whose mark might have been influenced by the religious values or beliefs of the grader in order to be "certain" that the subsidized teacher's time is not used to inculcate religion. See *Lemon, supra,* 403 U.S. at 609. Whether the procedures employed by the State to prevent improper use of its aid achieve the requisite degree of certainty must be determined in light of the subsidized activity's potential for use as a vehicle for religious indoctrination. *Lemon* involved subsidies for personnel expenses attributable to the teaching process as a whole (for certain classes), an activity which presents a continuous and comprehensive potential for religious indoctrination, since the omniscient influence of the teacher, particularly in lower schools, is the paramount factor determining the character of classroom instruction. See *Lemon, supra,* 403 U.S. at 618.

In contrast, the opportunity for religious indoctrination in the grading of end-of-course regents examinations is virtually nil. As we have noted, these examinations, given but once a year in any one class, require the grader to exercise subjective judgment only in connection with one, or possibly two, questions out of scores. These questions are prepared by the State, which provides instructions to guide the grading of essay questions. Clearly, the potential for advancing religion associated with the subsidized activities in this case is vastly inferior to that which the Court faced in *Lemon.*

ties, the careful auditing procedures anticipated by § 7 of the Statute should provide an adequate safeguard against inflated claims. In addition, since the services subsidized under the Statute are highly routinized, costs of the services for a given size of class should vary little from school to school, thus enabling the State to check claims filed by private schools against records maintained by hundreds of public schools under State supervision.[9]

For the foregoing reasons we conclude that Chapter 507, as amended, does not violate the Establishment Clause.

Settle judgment on notice.

Dated: New York, NY
December 11, 1978

WALTER R. MANSFIELD, U.S.C.J.

MORRIS E. LASKER, U.S.D.J.

I dissent in a separate opinion.

ROBERT J. WARD, U.S.D.J.

[9] The possibility that the process of appropriating funds to implement amended Chapter 507 might divide the State legislature among religious lines, which has not been suggested by the parties, does not pose a factor of sufficient consequence to warrant invalidation of the subsidization as constitutionally impermissible. See *Meek, supra,* 421 U.S. at 365, n.15. Indeed, in *Wolman* the Court upheld several provisions of the Ohio statute, involving annual expenditures of millions of dollars, without any reference to the potential for such discord in annual legislative consideration of expenditure bills.

Committee for Public Education and Religious Liberty, et al. v. Arthur Levitt, et al.
74 Civ. 2648 RJW

WARD, *District Judge* (Dissenting)

When the constitutionality of Chapter 507, as amended by Chapter 508, of the 1974 Laws of New York ("Chapter 507" or "the statute") was previously raised before this three-judge Court, we held that the statute violated the Establishment Clause because it had a primary effect[1] of advancing religion. *Committee for Public Education v. Levitt,* 414 F. Supp. 1174 (S.D.N.Y. 1976) ("*Levitt II*"). Our decision was based in large measure on the Supreme Court's holding in *Meek v. Pittinger,* 421 U.S. 349 (1975). In *Meek,* the Court invalidated a Pennsylvania statute's $12 million authorization for the loan of secular, nonideological, and neutral instructional materials to that state's predominantly church-related nonpublic schools. The Court reasoned:

> To be sure, the material and equipment that are the subjects of the loan—maps, charts, and laboratory equipment, for example—are "self-polic[ing], in that starting as secular, nonideological and neutral, they will not change in use." 374 F. Supp., at 660. But faced with the substantial amounts of direct support authorized by Act 195, it would simply ignore reality

[1] It is well-settled that "[i]n order to pass muster [under the Establishment Clause], a statute must have a secular legislative purpose, must have a principal or primary effect that neither advances nor inhibits religion, and must not foster an excessive government entanglement with religion." *Wolman v. Walter,* 433 U.S. 299, 236 (1977); *accord Roemer v. Maryland Public Works Board,* 426 U.S. 736, 748 (1976); *Meek v. Pittenger,* 421 U.S. 349, 358 (1975); *Committee for Public Education v. Nyquist,* 413 U.S. 756, 772-73 (1973); *Lemon v. Kurtzman,* 403 U.S. 602, 612-13 (1971).

to attempt to separate secular educational functions from the predominantly religious role performed by many of Pennsylvania's church-related elementary and secondary schools and to then characterize Act 195 as channeling aid to the secular without providing direct aid to the sectarian. Even though earmarked for secular purposes, "when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission," state aid has the impermissible primary effect of advancing religion. *Hunt v. McNair,* 413 U.S. 734, 743.

The church-related elementary and secondary schools that are the primary beneficiaries of Act 195's instructional material and equipment loans typify such religion-pervasive institutions. The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief. See *Lemon v. Kurtzman,* 403 U.S., at 616-617. Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole. "[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined." *Id.,* at 657 (opinion of Brennan, J.). See generally Freund, Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680, 1688-1689. For this reason, Act 195's direct aid to Pennsylvania's predominantly church-related, nonpublic elementary and secondary schools, even though ostensibly limited to wholly neutral, secular instructional material and

> equipment, inescapably results in the direct and substantial advancement of religious activity, cf. *Committee for Public Education & Religious Liberty v. Nyquist,* 413 U.S., at 781-783, and n.39, and thus constitutes an impermissible establishment of religion.

421 U.S. at 365-66 (footnote omitted).

Reading *Meek* to state that the provision of substantial amounts of direct aid to the educational function of sectarian elementary and secondary schools impermissibly advanced religion by aiding the sectarian school enterprise as a whole, we struck down Chapter 507's programs reimbursing New York sectarian schools[2] for the costs—primarily teacher salaries and fringe benefits[3]—incurred in complying with state-mandated testing and pupil attendance reporting. Eighty-five percent of the 1,954 nonpublic institutions eligible to receive reimbursement under the statute were religiously-affiliated elementary and secondary schools. The purpose of many of those schools was to provide an integrated secular and religious education, and their teaching process was largely devoted to instilling religious values and belief.[4] *See Meek, supra,* 421 U.S.

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[2] In view of its clear severability clause, we upheld the statute to the extent that it authorized funds to nonsectarian private schools. *Levitt II, supra,* 414 F. Supp. at 1180 & n.9.

[3] The reimbursement was not for salary supplements given teachers to compensate for the time devoted to funded activities, but rather represented a percentage of ordinary compensation which would have been paid even if the state-required services were not performed. *Levitt II, supra,* 414 F. Supp. at 1176.

[4] According to defendants' answers to plaintiffs' interrogatories filed prior to our decision in *Levitt II,* the recipients of the aid included schools which: "(1) are controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, (3) conduct their operations, curriculums and

at 356, 364, 366; *Lemon v. Kurtzman,* 403 U.S. 602, 616-17 (1971). As in *Meek,* the amount of aid, estimated at $8-$10 million annually, was substantial[5] and the form of the aid—payments to the schools themselves, subsidizing their operating costs—was direct. Accordingly, even though Chapter 507 was intended to aid only the secular educational function of the schools,[6] we held that the statute inevitably resulted in the direct and substantial advancement of religious activity.

My colleagues do not contend that we misconstrued or misapplied *Meek's* standard in our opinion in *Levitt II.* It is rather their position that in *Wolman v. Walter,* 433 U.S. 229 (1977), the Court *sub silentio* rejected the principles set forth in *Meek* two years earlier,[7] and adopted a new standard under which substantial direct aid to the educational function of sectarian schools is permissible, so

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programs to fulfill that purpose, (4) impose religious restrictions on admissions, (5) require attendance at instruction in theology and religious doctrine, (6) require attendance at or participation in religious worship, (7) are an integral part of the religious mission of the sponsoring church, (8) have as a substantial or dominant purpose the inculcation of religious values, (9) impose religious restrictions on faculty appointments, and/or (10) impose religious restrictions on what the faculty may teach." *Compare Meek, supra,* 421 U.S. at 356.

[5] Compare the $12 million for the loan of instructional materials and equipment involved in *Meek,* where more than 75% of the 1,320 schools were religiously affiliated. 421 U.S. at 364-65.

[6] The legislative purpose of the statute was "to evaluate, through a system of uniform state testing and reporting procedures, the quality and effectiveness of instruction to assure that those who are attending instruction, as required by law, are being adequately educated within their individual capabilities." 1974 N.Y. Laws ch. 507, § 1.

[7] Those principles were reaffirmed by the Court in *Roemer v. Maryland Public Works Board,* 426 U.S. 736, 753-55 (1976).

long as there is no substantial risk that the aid will be used for religious purposes. I see in *Wolman* no such retreat from *Meek* or reformulation of the applicable principles. I believe that *Meek* remains valid and that Chapter 507 cannot pass constitutional muster thereunder. Accordingly, I respectfully dissent.

That the testing and scoring provision in *Wolman*[8] was upheld does not, in my opinion, indicate that the Court has rejected *Meek's* standard as to the permissibility of aid to the educational function of sectarian schools. *Meek* did not hold that all such aid was *ipso facto* unconstitutional, but only that substantial direct aid was. 421 U.S. at 359, 364-66. In upholding *Wolman's* provision, the Court expressly noted that the Ohio statute did not authorize any payment to nonpublic school personnel for the costs of administering the tests. 433 U.S. at 239. Thus, it could not be claimed that the schools received direct aid in the form of such payments. Moreover, the Court reasoned, since nonpublic school personnel did not participate in either the drafting or the scoring of the tests, "[t]he nonpublic school [did] not control the content of the test or its result. This serve[d] to prevent the use of the test as a part of religious teaching, and thus avoid[ed] that kind of direct aid to religion found present in *Levitt* [v. *Committee for Public Education,* 413 U.S. 472 (1973)]."[9] 433 U.S. at 239-40. Because the Ohio

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[8] The Ohio statute under review in *Wolman* authorized the state "[t]o supply for use by pupils attending nonpublic schools within the district such standardized tests and scoring services as are in use in the public schools of the state." 433 U.S. at 238-39.

[9] In *Levitt v. Committee for Public Education,* 413 U.S. 472 (1973) (*"Levitt I"*), the Court invalidated the predecessor statute to Chapter 507, which had provided for reimbursement to sectarian schools of the expenses of teacher-prepared testing as

statute, in contrast to Chapter 507, did not involve direct aid to sectarian schools, I see no inconsistency between *Meek* and the result in *Wolman*.

Nor do I believe that there is anything in *Wolman* which stands for the proposition that substantial direct aid to the religious schools' educational function which has some potential for religious use is now constitutionally permissible so long as the possibility is not substantial. In addition to the testing and scoring services, the only provisions upheld in *Wolman* which included aid to the schools' educational function[10] were the programs for therapeutic, guidance, and remedial services provided

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well as standardized examinations and recordkeeping. While the Court's decision focused on the fact that no means were available to assure that the internally-prepared tests were free of religious instruction, *id.* at 480, the Court in *Wolman* made it clear that *Levitt I* did not imply that reimbursement to religious schools for the costs of testing would be constitutionally permissible if teacher-prepared examinations were eliminated. "The Court did not reach any issue regarding the standardized testing, for it found its funding inseparable from the unconstitutional funding of teacher-prepared testing." 433 U.S. at 240 n.8.

[10] The Court also upheld the provision of speech, hearing, and psychological diagnostic services to pupils attending nonpublic schools on the basis that they were public health services which could constitutionally be supplied to nonpublic school children as part of a general legislative program made available to all students. 433 U.S. at 242-44. The permissibility of including sectarian schools in programs providing "bus transportation, school lunches, and public health facilities—secular and nonideological services unrelated to the primary religion-oriented educational function of the sectarian school" was explicitly reaffirmed in *Meek*, 421 U.S. at 364, 371 n.21; *accord, Lemon, supra,* 403 U.S. at 616-17; *Everson v. Board of Education,* 330 U.S. 1, 14, 17-18 (1947). The Court indicated that the Pennsylvania statute's provision of diagnostic speech and hearing services would have been permissible as such a general welfare service. 421 U.S. at 371 n.21. The program was invalidated, however, because it was found to be unseverable from the unconstitutional provisions of the statute. *Id.; accord, Wolman, supra,* 433 U.S. at 243-44.

directly to students by public employees at public facilities,[11] *id.* at 248, and for the loan of textbooks to students, *id.* at 238. So far as I can discern, there is nothing in Justice Blackmun's opinion which indicates that either the testing and scoring or the therapeutic services were seen as presenting any potential whatsoever for diversion to religious use. Nor is there any suggestion that the aid would have been acceptable had any such possibility existed. Indeed, in order to uphold the loan of textbooks, the Court was forced to rely on the "unique presumption" of the non-divertibility of such aid created in *Board of Education v. Allen,* 392 U.S. 236 (1968). 433 U.S. at 251-52 n.18. Furthermore, the Court struck down the provision for the loan of instructional materials and equipment which were "incapable of diversion to religious use." *Id.* at 248-51.

Moreover, the Court clearly reaffirmed *Meek* in *Wolman* when it invalidated the programs providing field trip transportation and services to nonpublic schools students and the loan of instructional materials and equipment to pupils or their parents. In holding that the field trip provision had the impermissible effect of advancing religion, the Court, relying on *Meek,* reasoned that "the field trips are an integral part of the educational experience, and where the teacher works within and for a sectarian institution," impermissible direct aid is the inevitable result. *Id.* at 254. Furthermore, in striking down the loan of instructional materials and equipment, Justice Blackmun's opinion quoted *Meek* as follows:

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[11] As with the testing and scoring services, no direct aid was involved. No payments were provided to the schools, nor did the schools exercise control over the services. 433 U.S. at 244-48.

> "The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief. See *Lemon v. Kurtzman,* 403 U.S. at 616-617. Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole. '[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined.' *Id.,* at 657 (opinion of Brennan, J.)." 421 U.S., at 366.

Id. at 249-50. The Court concluded, just as it had in *Meek,* that "[i]n view of the impossibility of separating the secular education function from the sectarian, the state aid inevitably flow[ed] in part in support of the religious role of the schools." *Id.* at 250.

Given this reaffirmation of *Meek,* it seems clear to me that the constitutional standard set forth in that opinion is still controlling. I believe that Chapter 507 does not satisfy that standard. The statute is intended to compensate for secular educational services, but the funds granted thereunder flow directly to schools dedicated to a religious mission. Therefore, the state aid "inescapably results in the direct and substantial advancement of religious activity." *Meek, supra,* 421 U.S. at 366.

In my opinion, the funds provided for recordkeeping under Chapter 507 have the impermissible effect of advancing religion for still another reason. Pupil attendance reporting is as essential to the schools' sectarian educational function as it is to the secular aspect of the curriculum. Yet, as was the case with the payments to non-

public schools for nonideological maintenance and repair services involved in *Committee for Public Education v. Nyquist,* 413 U.S. 756, 774-80 (1973), no attempt has been made to restrict payments to those expenditures which are related exclusively to the schools' secular functions. Nor is such a restriction possible. Consequently, as in *Nyquist,* the state aid impermissibly advances religion by directly subsidizing the religious activities of sectarian schools. *Cf. Levitt v. Committee for Public Education,* 413 U.S. 472, 480 (1973) (*"Levitt I"*).

Chapter 507 has the further constitutional defect, in my view, of requiring excessive governmental entanglement with religion. My colleagues have recognized that some of the testing materials could be diverted to religious use and that the records submitted in support of claims for reimbursement could be inaccurate. Once these possibilities for diversion have been detected, it seems to me that excessive state entanglement with religion is inevitable in order to avoid the impermissible effect of advancing religion:

> We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. . . .
>
> . . . But the potential for impermissible fostering of religion is present. . . . The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion . . . .
>
> A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. . . .

Lemon, supra, 403 U.S. at 618-19; *accord, Wolman, supra,* 433 U.S. at 254; *Meek, supra,* 421 U.S. at 369-70.

In order to be *certain* that teachers whose salaries are subsidized by Chapter 507 do not use the testing materials for religious purposes, I believe that the state's current procedure of reviewing a random sample of examination papers for academic content would have to be supplemented by a detailed search for religious values or belief in the grading of all test papers in which the teacher exercises subjective judgment. For "[u]nlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment." *Lemon, supra,* 403 U.S. at 619; *accord, Wolman, supra,* 433 U.S. at 254; *see Levitt I, supra,* 413 U.S. at 481. Such a system of continuous monitoring of the grading of examinations by religious school teachers would constitute excessive entanglement between church and state. *See Wolman, supra,* 433 U.S. at 254; *Meek, supra,* 421 U.S. at 369-72; *Lemon, supra,* 403 U.S. at 617-19.

In addition, most of the state aid under Chapter 507 is for reimbursement of the cost of teacher salaries and fringe benefits. Such reimbursable costs are based upon the number of hours teachers devote to the funded activities. The schools are required to submit a form entitled "Justification of Salary and Fringe Benefit Costs Claimed For State Aid For Testing, Reporting and Evaluating" on which the reimbursable costs are calculated by first computing the percentage of aggregate total work time devoted to funded services and then multiplying the amount of aggregate wages and benefits by the percentage. While this form and the additional reporting

and auditing procedures[12] suffice to ensure the mathematical accuracy of the computations, they do

[12] Chapter 507 provides in this regard:

§ 4. Application.

Each school which seeks an apportionment pursuant to this act shall submit to the commissioner an application therefor, together with such additional reports and documents as the commissioner may require, at such times, in such form and containing such information as the commissioner may prescribe by regulation in order to carry out the purposes of this act.

§ 5. Maintenance of records.

Each school which seeks an apportionment pursuant to this act shall maintain a separate account or system of accounts for the expenses incurred in rendering the services required by the state to be performed in connection with the reporting, testing and evaluation program enumerated in section three of this act. Such records and accounts shall contain such information and be maintained in accordance with regulations issued by the commissioner, but for expenditures made in the school year nineteen hundred seventy-three-seventy-four, the application for reimbursement made in nineteen hundred seventy-four pursuant to section four of this act shall be supported by such reports and documents as the commissioner shall require. In promulgating such record and account regulations and in requiring supportive documents with respect to expenditures incurred in the school year nineteen hundred seventy-three-four, the commissioner shall facilitate the audit procedures described in section seven of this act. The records and accounts for each school year shall be preserved at the school until the completion of such audit procedures.

§ 6. Payment.

No payment to a qualifying school shall be made until the commissioner has approved the application submitted pursuant to section four of this act.

§ 7. Audit.

No application for financial assistance under this act shall be approved except upon audit of vouchers or other documents by the commissioner as are necessary to insure that such payment is lawful and proper.

The state department of audit and control shall from time to time examine any and all necessary accounts and records of a qualifying school to which an apportionment has been made pursuant to this act for the purpose of determining the cost to such school of rendering the services referred to in

nothing to verify that the percentage of total time claimed for reimbursable activities is based upon the number of hours teachers have actually devoted to purely secular functions.[13] Indeed, in order to be certain, as the

section three of this act. If after such audit it is determined that any qualifying school has received funds in excess of the actual cost of providing the services enumerated in section three of this act, such school shall immediately reimburse the state in such excess amount.

In addition, section 176.2 of the Regulations of the Commissioner of Education provides:

Application for apportionment and required accounting records.

(a) A nonpublic school requesting apportionment of State monies in connection with Chapter 507 of the Laws of 1974 shall submit an application to the State Education Department in the form and at such time as the Commissioner of Education shall require. In addition such nonpublic school shall submit completed apportionment worksheets as required by the Commissioner of Education.

(b) Each nonpublic school making application for apportionment during the school year 1975-76 and thereafter shall maintain at least the following records in support of the claim for apportionment:

(1) A separate set of expenditure accounts for each required service showing the amounts which are claimed for apportionment. These shall include accounts for salaries, supplies and materials, contractual expenses and fringe benefits.

(2) A time record for each employee involved in providing services for which apportionment is requested. This record shall clearly indicate the amount of time devoted to each service.

(3) An individual salary record for each employee involved in providing services for which apportionment is requested. This record shall show gross salary, payroll deductions and net salary by payroll period. Payroll summary records yielding the same information may be maintained in lieu of individual salary records.

(4) A voucher file which shall include all paid vouchers, in whole or in part, used to substantiate costs included in the claim for apportionment.

[13] I do not agree with my colleagues' suggestion that the accuracy of the time charged can be safeguarded by comparing the claims of private schools with those of public schools. To my knowledge, there is nothing in the record which indicates that any such comparison is included in the auditing pro-

Establishment Clause demands, that none of the schools' religious functions have been served during the time charged, constant on-site inspection of sectarian schools would be required. Such a system of continuous state surveillance of the activities of religious schools would clearly constitute excessive state entanglement with religion. *See Lemon, supra,* 403 U.S. at 617-19, 621-22.

Moreover, in my opinion, the instant statute has resulted in excessive entanglement of yet another sort. To determine the constitutionality under the Establishment Clause of the aid provided by Chapter 507, my colleagues have examined for possible religious meaning the sample tests and other documents submitted by the parties and have decided on the basis of this evidence that there was no substantial risk that the state aid could be used for religious purposes. The Supreme Court has stated, however, that the very adjudication required under such an approach is, in itself, excessive governmental entanglement with religion. In *New York v. Cathedral Academy,* 434 U.S. 125 (1977), the Court held that New York State could not reimburse sectarian schools for the costs of state-mandated recordkeeping and testing services which were incurred in reliance on the predecessor statute to Chapter 507 before it was held unconstitutional in *Levitt I.* In response to the sectarian school plaintiff's argument that the Court of Claims would review all expenditures for which reimbursement was sought, in order to be certain that state funds did not subsidize sectarian activites, Justice Stewart, speaking for the majority, explained:

cedures, *see* Footnote 12, *supra,* or which suggests that public schools even maintain comparable time records. In any event, I do not believe that the comparisons by approximation are sufficient to satisfy the dictates of the Establishment Clause.

> [E]ven if such an audit were contemplated, we agree with the appellant that this sort of detailed inquiry into the subtle implications of in-class examinations and other teaching activities would itself constitute a significant encroachment on the protections of the First and Fourteenth Amendments. In order to prove their claims for reimbursement, sectarian schools would be placed in the position of trying to disprove any religious content in various classroom materials. In order to fulfill its duty to resist any possibly unconstitutional payment, . . . the State as defendant would have to undertake a search for religious meaning in every classroom examination offered in support of a claim. And to decide the case, the Court . . . would be cast in the role of arbiter of the essentially religious dispute.
>
> The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment, and it cannot be dismissed by saying it will happen only once. Cf. *Presbyterian Church v. Blue Hull Mem. Presb. Church,* 393 U.S. 440.

434 U.S. at 132-33.

In the instant case, it would appear that a one-time review such as that contemplated in *Cathedral Academy* would not suffice to ensure the neutrality of the aid provided by the New York statute. Chapter 507 authorizes reimbursement for teacher-time devoted not only to the reporting and examination programs currently in effect, but also to such "other similar state prepared examinations and reporting procedures" as may be developed in the future. 1974 N.Y. Laws ch. 507, § 3. Furthermore,

even within the current testing programs, the examination questions presented to students and graded by state-subsidized teachers are constantly changing. While the majority may be satisfied that the risk of diversion to religious use presented by the sample examination questions and materials they have reviewed to date is not substantial, I know of no way short of continuing surveillance to guarantee that the same is true of materials and examinations prepared in the future.

Accordingly, I conclude that Chapter 507 is unconstitutional under the Establishment Clause to the extent that it authorizes the allocation of state funds to sectarian schools,[14] both because it has a primary effect of advancing religion and because it fosters excessive governmental entanglement with religion.

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[14] Section 9 of the statute contains a severability clause in which the legislature expressed a clear intent that the act remain in force as to nonsectarian schools should its application as to sectarian schools be held to violate the Establishment Clause. *See* 1974 N.Y. Laws ch. 507, as amended by ch. 508, § 9. *Compare Sloan v. Lemon,* 413 U.S. 825, 833-34 (1973). Accordingly my conclusion as to the unconstitutionality of the statute is limited to its application to sectarian schools.